

Office - Supreme Court, U. S.

FILED

NOV 4 1940

CHARLES ELMORE GROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 551 ✓

ANNA L. RAYMOND,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

JAMES F. OATES, JR.,
MERRITT C. BRAGDON,
MIDDLETON MILLER,
Attorneys for Petitioner.

SIDLEY, McPHERSON, AUSTIN & BURGESS,
11 South La Salle Street,
Chicago, Illinois,
Of Counsel.



SUBJECT INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI.....	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved.....	4
Summary statement of the facts involved.....	4
Commissioner's determination	7
Action of Board of Tax Appeals.....	7
Action of Circuit Court of Appeals.....	9
Specification of errors to be urged.....	10
Reasons relied on for the allowance of the writ.....	11
 BRIEF IN SUPPORT OF PETITION.....	 17
Summary of argument.....	18
Argument	20
I. The consideration paid for petitioner's annuities was the entire amount transferred by petitioner..	20
II. Section 22(b)(2) of the Revenue Act of 1934 should be construed not to apply to petitioner's annuities	27
A. The Section does not apply to annuities paid by charitable corporations.....	27
B. The Section does not apply to annuities pur- chased before its passage.....	29

	PAGE
III. Section 22(b)(2) of the Revenue Act of 1934 is unconstitutional	31
A. The Section imposes a direct tax on capital without apportionment	31
B. The Section is so arbitrary and capricious as to violate the due process clause.....	36
Conclusion	38
APPENDIX A (Revenue Act of 1934 and Regulations 86)....	39
APPENDIX B (Revenue Acts and Regulations from 1918 to 1932)	42
APPENDIX C (Constitutional Provisions Involved).....	50
APPENDIX D (Congressional Committee Reports).....	51

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Blodgett v. Holden, 275 U. S. 142, 147, 148.....	12, 13, 30, 37
Bowers v. Kerbaugh-Empire Co., 271 U. S. 170, 174.....	12, 31
Brewster v. Gage, 280 U. S. 327, 337.....	25
Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110, 114	34
Burnet v. Logan, 283 U. S. 404, 412, 414.....	12, 23, 32, 34
Commissioner v. Edwards Drilling Co., 95 F. (2d) 719 (C. C. A. 5th, 1938).....	32
Commissioner v. Speyer, 77 F. (2d) 824 (C. C. A. 2d, 1935)	13, 32
Continental Illinois Bank and Trust Co. v. Blair, 45 F. (2d) 345, 347 (C. C. A. 7th, 1930).....	21
Deputy v. du Pont, 308 U. S. 488, 493.....	21
Doyle v. Mitchell Brothers Co., 247 U. S. 179, 185.....	12, 31
Eisner v. Macomber, 252 U. S. 189, 205-207.....	12, 31, 34, 36
Estate of Sanford v. Commissioner, 308 U. S. 39, 42.....	14
F. A. Gillespie v. Commissioner, 38 B. T. A. 673, 676 (1938)	14, 15, 21
Goodrich v. Edwards, 255 U. S. 527, 535.....	12, 31
Hassett v. Welch, 303 U. S. 303.....	12, 25, 28, 30
Heiner v. Donnan, 285 U. S. 312, 325-329.....	13, 37
Heiner v. Mellon, 89 F. (2d) 141 (C. C. A. 3d, 1937).....	13, 32
Helvering v. Drier, 79 F. (2d) 501 (C. C. A. 4th, 1935).....	13, 32
Helvering v. Helmholtz, 296 U. S. 93, 98.....	12, 13, 30, 37
Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 115	25
Helvering v. San Joaquin Co., 297 U. S. 496, 499.....	21
Helvering v. Winmill, 305 U. S. 79, 83.....	25
Hooper v. Tax Commission, 284 U. S. 206, 215.....	13, 37

	PAGE
Letts v. Commissioner, 84 F. (2d) 760 (C. C. A. 9th, 1936) . . .	13, 32
Lewellyn v. Frick, 268 U. S. 238, 251	12, 30
Alvina Ludorff v. Commissioner, 40 B. T. A. 32 (1939) . . .	13, 32
Nichols v. Coolidge, 274 U. S. 531, 542	13, 37
Thomas A. O'Donnell v. Commissioner, 25 B. T. A. 956, 961 (1932), (affirmed 64 F. (2d) 634)	13, 32
Old Colony Railroad Co. v. Commissioner, 284 U. S. 552, 560	21
Phoenix Life Insurance Co. v. Raddin, 120 U. S. 183, 197 . . .	20
Florence M. Quinn v. Commissioner, 35 B. T. A. 412 (1937)	13, 32
Rocky Mountain Development Co. v. Commissioner, 38 B. T. A. 1303 (1938)	13, 32
Schlesinger v. Wisconsin, 270 U. S. 230, 240	13, 37
Shwab v. Doyle, 258 U. S. 529, 534	12, 30
Taft v. Bowers, 278 U. S. 470, 481	31, 34
Title Guarantee & Trust Co., Executor v. Commissioner, 40 B. T. A. 475 (1939)	15
United States v. San Francisco, 310 U. S. 16, 21-25; 60 Sup. Ct. 749, 752-755	28
United States v. St. Paul, Minneapolis & Manitoba Rail- way Co., 247 U. S. 310, 316	28
Untermeyer v. Anderson, 276 U. S. 440, 445	13, 37
Woolford Realty Co. v. Rose, 286 U. S. 319, 327	21

STATUTES.

PAGE

Judicial Code, Sec. 240(a)	2
Revenue Act of 1934, 48 Stat. 680:	
Sec. 22(a)	3, 10, 20, 29, 39
Sec. 22(b) (2)	3, 10, 11, 20, 22, 27, 29, 31, 36, 39
Revenue Act of 1932, 47 Stat. 169:	
Sec. 22(b) (2)	24, 44
Revenue Act of 1928, 45 Stat. 791:	
Sec. 22(b) (2)	24, 44
Revenue Act of 1926, 44 Stat. 9:	
Sec. 213(b) (2)	24, 43
Revenue Act of 1924, 43 Stat. 253:	
Sec. 213(b) (2)	24, 43
Revenue Act of 1921, 42 Stat. 227:	
Sec. 213(b) (2)	24, 42
Revenue Act of 1918, 40 Stat. 1057:	
Sec. 213(b) (2)	24, 42
Constitution of the United States,	
Article I, Section 2, Clause 3, and	
Article I, Section 9, Clause 4	4, 11, 12, 31, 36, 50
Constitution of the United States,	
Fifth Amendment	4, 11, 13, 36, 37, 50

TREASURY REGULATIONS.

Regulations 86 (1934) : Arts. 22(a)-12, 22(b) (2)-2	25, 40
Regulations 77 (1932) : Arts. 62, 82	24, 48
Regulations 74 (1928) : Arts. 62, 82	24, 47
Regulations 69 (1926) : Arts. 47, 72	24, 47
Regulations 65 (1924) : Arts. 47, 72	24, 46
Regulations 62 (1921) : Arts. 47, 72	24, 45
Regulations 45 (1918) : Arts. 47, 72	24, 45

CONGRESSIONAL REPORTS AND DEBATES.

	PAGE
House Ways and Means Committee Report, 73d. Cong., 2d. Sess., H. Rept. No. 704.....	28, 36, 51
Senate Finance Committee Report, 73d. Cong., 2d. Sess., S. Rept. No. 558.....	52
Conference Committee Report, 73d. Cong., 2d. Sess., H. Rept. No. 1385.....	53
Congressional Record, 73d. Cong., 2d. Sess., Vol. 78, Part. 6, pages 5911, 5915, 5916.....	14, 27

TEXT AUTHORITIES.

American Law Institute, Restatement of Law of Contracts (1932), Vol. 1, pages 80, 81.....	20
Williston on Contracts (Rev. Ed. 1936), Vol. 1, page 319.....	20
George Grayson Tyler and John P. Ohl, "The Revenue Act of 1934," U. of Pa. L. Rev., Vol. 83, pages 607, 633 (March, 1935)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No.

ANNA L. RAYMOND,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

Your petitioner, Anna L. Raymond, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on June 22, 1940 (R. 153), affirming a decision of the United States Board of Tax Appeals, determining a deficiency in petitioner's income tax for the calendar year 1934 (R. 120).

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 104-112) and a dissenting opinion of Board Member Black (R. 112-114) are reported in 40 B. T. A. 244. Additional findings of fact made by the Board pursuant to petitioner's motion, have not been reported, but are in the Record (R. 120-129). The opinion of the Circuit Court of Appeals (R. 147-153) is reported in 114 F. (2d) 140.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 22, 1940 (R. 153). A petition for rehearing was seasonably filed and was denied without opinion on August 9, 1940 (R. 153, 175). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

During the years 1925 to 1930, the petitioner made nine annuity agreements with six charitable and educational institutions. Under these agreements petitioner transferred to the institutions \$1,246,906.76, and the institutions agreed to pay petitioner specified annuities aggregating \$62,500.00 a year during her life (R. 25-28, 33-49). The aggregate payments received by petitioner under each agreement from its execution until December 31, 1934, were less than the amount transferred by petitioner to the institution under such agreement (R. 28-29).

The underlying issue is whether any part of the annuity payments received by petitioner in 1934, was taxable income. This issue presents the following questions:

1. Whether the consideration paid by petitioner for the annuities, within the meaning of Section 22(b)(2) of the Revenue Act of 1934,* or for the purpose of determining gain under Section 22(a), consisted of the entire amount transferred by her under the annuity agreements and required by the institutions as a condition for the agreements, or whether it consisted of only the average prices charged by insurance companies for similar annuities, as held below.

2. Whether Section 22(b)(2) of the Revenue Act of 1934, in so far as it includes in gross income in each year, three per cent of the consideration paid for an annuity, before the entire consideration has been recovered, should be construed to apply to annuities paid by

* The Revenue Act of 1934, in Section 22(b)(2), provides for the first time that annuity payments received to the extent of three per cent of the "consideration paid" for the annuity are taxable income in each year, and that only the remainder shall be excluded from gross income, until the aggregate amount so excluded from gross income equals the "consideration paid". Thereafter the entire payments received are taxable. Under prior tax laws the entire payments received were exempt from tax until the aggregate amount received equaled the "consideration paid". The pertinent provisions of Section 22(b)(2) of the 1934 Act are set forth in Appendix A, page 39. The pertinent provisions of corresponding sections of prior revenue acts are set forth in Appendix B, pages 42-45.

charitable corporations, or to annuities purchased before the passage of the 1934 Act.

3. Whether Section 22(b)(2) of the Revenue Act of 1934, if applicable to petitioner's annuities, is unconstitutional and void, for the reason that it imposes a direct tax on capital without apportionment among the States and therefore violates the provisions of Article I, Section 2, Clause 3, and of Article I, Section 9, Clause 4 of the Constitution of the United States; or for the further reason that it is so arbitrary and capricious as to violate the due process clause of the Fifth Amendment to the Constitution.

The petitioner has from the beginning of this case, before the Board of Tax Appeals (R. 13, 23-24) and in the Circuit Court of Appeals (R. 136), challenged the constitutionality of the statute and relied upon the above mentioned Constitutional provisions.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in Appendix A, *infra*, pages 39-41.

The Constitutional provisions relied on are set forth in Appendix C, *infra*, page 50.

SUMMARY STATEMENT OF THE FACTS INVOLVED.

There is no dispute on the facts. The dates of petitioner's annuity agreements, the names of the institutions, the value of the property transferred by petitioner, and the amounts of the annuities, were as follows (R. 28):

Date of Agreement	Institution	Value of Property Transferred	Annuity
July 24, 1925	Art Institute of Chicago....	\$ 98,937.50	\$ 5,000.00
July 27, 1925	Field Museum of Natural History	302,150.00	15,000.00
Aug. 4, 1925	St. Luke's Hospital.....	98,265.00	5,000.00
Aug. 5, 1925	University of Chicago.....	100,831.67	5,000.00
Dec. 1, 1925	Field Museum of Natural History	198,772.09	10,000.00
Feb. 15, 1926	Art Institute of Chicago....	200,000.00	10,000.00
May 7, 1926	Northwestern University ...	150,000.00	7,500.00
Aug. 10, 1927	Northwestern University ...	50,000.00	2,500.00
May 22, 1930	Children's Memorial Hospital	47,950.50	2,500.00
Totals		\$1,246,906.76	\$62,500.00

Petitioner was born on January 21, 1854, and at the date of execution of the first agreement, July 24, 1925, she was 71½ years old (R. 29).

Except for the first agreement, which was evidenced by letters (R. 25, 33-34), all of the agreements were formal written contracts executed by petitioner and the respective institutions (R. 26-28, 35-49). They were all substantially identical in their language and form, except as to dates and amounts. The agreements all contained a provision substantially the same as the following, which appears in the contract dated August 4, 1925, with St. Luke's Hospital (R. 38):

“Second: Said party of the second part [St. Luke's Hospital], in consideration of the transfer to it of the securities and stocks hereinabove scheduled by said party of the first part [Anna L. Raymond], covenants and agrees to pay to said party of the

first part in each and every year during her life an annuity of Five Thousand Dollars (\$5,000), . . .”

The “securities and stocks” referred to in the above provision constituted the entire amount transferred by petitioner under the agreement.

The Board of Tax Appeals found, in effect, that the petitioner asked the institutions for and received from them the largest annuities which they were willing to pay in return for the property transferred; that these institutions have made approximately eighty-four annuity agreements in the aggregate, including the nine made with petitioner; that the rate of the annuities payable under petitioner’s agreements (five per cent) was substantially the same as under all other annuity agreements made by these institutions; and that the institutions were not willing and could not afford to agree to pay the annuities for the prices charged for similar annuities by insurance companies (R. 124-127).

The aggregate payments received by petitioner under each agreement, from its execution to December 31, 1934, were less than the value of the property transferred by petitioner to the institution under such agreement (R. 28-29). At the end of the year involved petitioner had not recovered her capital, or the consideration paid for the annuity.

COMMISSIONER'S DETERMINATION.

The Commissioner of Internal Revenue determined that the "consideration paid" for the annuities was not the amount actually paid, but was only an amount equal to the present worth of the annuities at the date of the agreements, computed in accordance with Table A contained in Treasury Regulations 80 relating to the federal estate tax, which is based on the Actuaries' or Combined Experience Table of Mortality; and that the total consideration paid for all nine annuities was only \$354,639.91 (R. 16, 30, 91, 94).

The Commissioner included in petitioner's gross income for 1934 the entire amount of the first eight annuities, or \$60,000.00. He also included in gross income for that year, under his construction of Section 22(b)(2) of the 1934 Act, an amount equal to three per cent of the consideration computed by him for the ninth annuity (R. 18, 30-31, 94).

Petitioner appealed to the Board of Tax Appeals (R. 3), contending that the consideration which she paid was the entire amount required by the institutions, and that no part of the annuities received in 1934 was taxable income (R. 12-13).

ACTION OF BOARD OF TAX APPEALS.

The Board adopted the Commissioner's determination, that only a part of the amount transferred by petitioner was the "consideration paid" for the annuities. However, the Board concluded that the Actuaries' Mortality Table, on which the Commissioner's computation was based, was

outmoded, having been prepared in Great Britain in 1843 from experience data which have long since been regarded in this country as obsolete (R. 110). The Board therefore substituted another hypothetical "consideration," also less than the amount actually paid, and increased the amount of the so-called "consideration" from the Commissioner's figure of \$354,639.91, to the average prices at which petitioner could have purchased her annuities from five large American insurance companies, or \$528,745.52 for all nine annuities (R. 82, 83, 104, 111, 119). The Board also held that Section 22(b)(2) of the 1934 Act was constitutional (R. 111-112).

The aggregate payments received by petitioner prior to and during 1934 under the first seven agreements exceeded the insurance company prices for similar annuities (R. 106), and the Board included in petitioner's gross income the amount of such excess (R. 111, 119). The aggregate payments received under the last two agreements through the year 1934, were less than the insurance company prices for similar annuities (R. 106), and the Board, acting under its construction of Section 22(b)(2) of the 1934 Act, included in petitioner's income three per cent of the "consideration" for those annuities as determined by the Board (R. 111, 119). The total amount of the annuity payments held taxable by the Board in 1934 was \$28,138.66.*

* Under the Board's conclusion regarding the amount of the consideration, the entire amount of the first seven annuities, or \$57,500.00, will constitute taxable income of petitioner in each year after 1934. The entire amounts of the last two annuities (\$2,500.00 each) will become taxable in 1937 and 1939, respectively.

In a dissenting opinion Board Member Black concluded that the entire amount transferred by petitioner under the agreements was the consideration paid for the annuities (R. 112-114).

Petitioner appealed to the Circuit Court of Appeals (R. 129), but the Commissioner did not appeal.

ACTION OF CIRCUIT COURT OF APPEALS.

The decision of the Board of Tax Appeals was affirmed by the Circuit Court of Appeals (R. 153), in an opinion which summarily concluded that the amount paid by the petitioner for the annuities was in excess of both their "fair" and "actual cost", and that Section 22(b)(2) was applicable and valid (R. 152-153). The Court's opinion discloses a misconception of the statutory provision and of petitioner's contentions. It contains no discussion of the issues nor any reference to the many applicable authorities. We respectfully refer this Court to the petition for rehearing (R. 157-173), which reviews the misapprehensions of the Circuit Court of Appeals. That will not be repeated here. The petition for rehearing was denied without opinion (R. 175).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the consideration paid for petitioner's annuities, within the meaning of Section 22(b)(2) of the Revenue Act of 1934, did not exceed the average prices at which similar annuities could have been purchased from five American life insurance companies.

2. In failing to hold that the entire amount transferred by petitioner under the annuity agreements was the consideration paid for the annuities, within the meaning of Section 22(b)(2) of the Revenue Act of 1934.

3. In failing to hold that the entire amount transferred by petitioner under the annuity agreements was the cost basis for determining petitioner's gain from the annuities under Section 22(a) of the Revenue Act of 1934.

4. In holding that Section 22(b)(2) of the Revenue Act of 1934 applies to annuities paid by charitable corporations.

5. In holding that Section 22(b)(2) of the Revenue Act of 1934 applies to annuities purchased before its passage.

6. In holding that Section 22(b)(2) of the Revenue Act of 1934, in so far as it includes in petitioner's gross income for 1934, an amount equal to three per centum of the consideration paid for her annuities, before the entire consideration has been recovered, is constitutional and valid.

7. In failing to hold that Section 22(b)(2) of the Revenue Act of 1934 imposes a direct tax on capital with-

out apportionment among the States and contravenes Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, of the Constitution of the United States.

8. In failing to hold that Section 22(b)(2) of the Revenue Act of 1934 is so arbitrary and capricious as to contravene the due process clause of the Fifth Amendment to the Constitution of the United States.

9. In holding that any part of the annuity payments received by petitioner in the year 1934 constituted taxable income of petitioner.

10. In holding that petitioner was liable for any income tax for the year 1934.

11. In affirming the decision of the United States Board of Tax Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In holding that the consideration paid for petitioner's annuities, within the meaning of Section 22(b)(2) of the Revenue Act of 1934, was less than the entire amount transferred by petitioner and uniformly required by the institutions, and did not exceed the average prices charged by insurance companies for similar annuities, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

2. In holding that Section 22(b)(2) of the Revenue Act of 1934 applies to annuities paid by charitable

corporations, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

3. In holding that Section 22(b)(2) of the Revenue Act of 1934 applies to annuities purchased before its passage, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, holding that tax laws should not be given a retroactive effect. (*Shwab v. Doyle*, 258 U. S. 529, 534-537; *Lewellyn v. Frick*, 268 U. S. 238, 251-252; *Blodgett v. Holden*, 275 U. S. 142, 148-149; *Helvering v. Helmholtz*, 296 U. S. 93, 98; *Hassett v. Welch*, 303 U. S. 303, 307, 314.)

4. In holding that Section 22(b)(2) of the Revenue Act of 1934 does not impose a direct tax on capital, and does not violate the provisions of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, of the Constitution of the United States, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way probably in conflict with applicable decisions of this Court. (*Burnet v. Logan*, 283 U. S. 404, 412-414; *Eisner v. Macomber*, 252 U. S. 189, 205-207; *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 185; *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170; *Goodrich v. Edwards*, 255 U. S. 527, 535.) The decision is also in probable conflict with numerous decisions of other Federal Courts and the United States Board

of Tax Appeals, holding that where the receipt of future payments is contingent on unpredictable events, no income is received until the capital has been recovered. (*Helvering v. Drier*, 79 F. (2d) 501; *Commissioner v. Speyer*, 77 F. (2d) 824; *Heiner v. Mellon*, 89 F. (2d) 141; *Letts v. Commissioner*, 84 F. (2d) 760; *Florence M. Quinn v. Commissioner*, 35 B. T. A. 412; *Alvina Ludorff et al., Executors v. Commissioner*, 40 B. T. A. 32; *Thomas A. O'Donnell v. Commissioner*, 25 B. T. A. 956, affirmed 64 F. (2d) 634; *Rocky Mountain Development Co. v. Commissioner*, 38 B. T. A. 1303.)

5. In holding that Section 22(b)(2) of the Revenue Act of 1934 is not so arbitrary and capricious as to violate the due process clause of the Fifth Amendment to the Constitution of the United States, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way probably in conflict with applicable decisions of this Court. (*Hoeper v. Tax Commission*, 284 U. S. 206, 215; *Schlesinger v. Wisconsin*, 270 U. S. 230, 240; *Heiner v. Donnan*, 285 U. S. 312, 325-329; *Nichols v. Coolidge*, 274 U. S. 531, 542; *Blodgett v. Holden*, 275 U. S. 142, 147; *Untermeyer v. Anderson*, 276 U. S. 440, 445; *Helvering v. Helmholtz*, 296 U. S. 93, 98.)

The above questions are of far-reaching importance because their decision will determine the extent of taxability of all annuities paid by charitable corporations, under the new provision first adopted in the Revenue

Act of 1934, and carried forward in subsequent acts. It is well known that the aggregate number and amount of such annuities are very large. The extent of taxability of such annuities has been surrounded with uncertainty, and that uncertainty has not been removed by the Circuit Court of Appeals in this case.

Until the correct principle regarding the amount of consideration paid for such annuities is determined by this Court, the Commissioner can continue to apply opposite rules to different taxpayers, depending on which rule will produce the largest tax at the time from that particular taxpayer. That the Commissioner has done this is evidenced by a comparison of the instant case with *F. A. Gillespie v. Commissioner*, 38 B. T. A. 673 (1938). There, the contention now made by this petitioner was urged by the Commissioner, since there it resulted in a larger tax, and it was upheld by the Board. A decision by this Court is necessary to establish a single rule to be applied uniformly, regardless of the resulting tax liability in each case. See *Estate of Sanford v. Commissioner*, 308 U. S. 39, 42.

The constitutionality of this new provision of the 1934 Act has been in doubt since before its passage. In the Senate debate on the provision, several Senators expressed the opinion that it would impose a tax on capital.* Its

* Congressional Record, 73d Congress, 2d Session, Vol. 78, Part 6:

Page 5911:

“Mr. Hebert. . . . Let us assume that a man pays a premium of \$10,000 for an annuity. Surely until

constitutionality was questioned in an article entitled, "The Revenue Act of 1934", by George Grayson Tyler and John P. Ohl, in *University of Pennsylvania Law Review*, Volume 83, page 607, at page 633, Footnote 200 (March, 1935). It has also been more recently challenged in the cases of *F. A. Gillespie v. Commissioner*, 38 B. T. A. 673 (1938), and *Title Guarantee & Trust Co., Executor, Estate of Mary A. Bedford v. Commissioner*, 40 B. T. A. 475 (1939). This provision is probably the first attempt to impose an income tax based, not on the income which each taxpayer actually receives, but on the estimated aver-

he receives back from the company the sum of \$10,000, there has been no income to him, and it is just as if he took the \$10,000 and put it underneath the mattress and took away from it \$1,000 each year for 10 years."

Page 5915:

"Mr. Bone. Mr. President, in view of the Senator's argument that this tax is an invasion of the corpus of the property, diminishing it year by year, I gather that the Senator's idea is that this is, in effect and by indirection, a capital levy rather than a tax on income."

"Mr. Hebert. To the extent that we tax something that is not there, of course, it is a capital levy."

"Mr. Smith. I am perfectly in sympathy with the proposition of the Senator, for the reason that until the annuitant has received back—whether the time be short or long—the amount he paid for his annuity, he has earned nothing."

Page 5916:

"Mr. Austin. . . . The pending bill undertakes to tax a return of the capital and nothing more, up to the time when the annuitant has received the whole of the amount of the consideration paid by him. . . ."

age income of a large class of taxpayers. The constitutionality of the provision will remain in doubt until it is determined by this court.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

JAMES F. OATES, JR.,
MERRITT C. BRAGDON,
MIDDLETON MILLER,
Attorneys for Petitioner.

SIDLEY, McPHERSON, AUSTIN & BURGESS,
11 South La Salle Street,
Chicago, Illinois,
Of Counsel.

